

DEPARTMENT OF EDUCATION

Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964; Proposed Policy Guidance

AGENCY: Department of Education

ACTION: Notice of Proposed Policy Guidance, Request for Comment

SUMMARY: The Department of Education issues proposed policy guidance on Title VI of the Civil Rights Act of 1964 and its implementing regulations. The proposed policy guidance discusses the applicability of the statute's and regulations' nondiscrimination requirement to student financial aid that is awarded, at least in part, on the basis of race or national origin. The Department solicits from all interested parties written comments on the proposed policy guidance.

DATES: Written comments should be sent to the Department of Education on or before March 9, 1992.

ADDRESSES: Written comments should be sent to Assistant Secretary Michael Williams, Office for Civil Rights, U.S. Department of Education, 330 C Street, S.W., Washington, D.C. 20202.

FOR FURTHER INFORMATION CONTACT: Jeanette Lim, Office for Civil Rights, Telephone (202) 732-1635 (TDD: (202) 732-1663).

SUPPLEMENTARY INFORMATION: The Department's most recent data (1989) indicate that about 5.5 million of America's 13 million

college students receive scholarships or loans to help pay the cost of their education. According to the American Council on Education, approximately 3.5 percent -- about 45,000 -- of all minority students at four-year colleges receive "race-exclusive scholarships", that is, scholarships for which students of only a designated race or national origin may compete. ACE reports that colleges most often offer race-exclusive scholarships in order to increase the diversity of their student populations.

The purpose of this proposed guidance is to answer the following question: Under what circumstances may colleges offer such race-exclusive scholarships, or other scholarships designed to create diversity, without violating federal law, specifically, Title VI of the Civil Rights Act of 1964, which states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"?

Since its founding in 1980, the U.S. Department of Education has received fewer than a dozen complaints or inquiries that have addressed the permissibility of race-exclusive scholarships. The Department's few statements have been inconsistent. There has never been a full policy review and clear set of principles announced upon which colleges might rely in planning and

administering student aid programs in which race or national origin may be a factor.

The U.S. Department of Education has now conducted such a review of policy, beginning with its request for public comment published in the FEDERAL REGISTER on May 30, 1991. It has conducted this review because Congress has given the Department two assignments which, when race-exclusive scholarships are involved, sometimes seem to compete: (1) to promote scholarship and loan programs that help disadvantaged Americans afford college, and (2) to enforce laws that say that colleges receiving federal funds may not discriminate based upon race, color or national origin.

Today the Department is publishing for comment in the FEDERAL REGISTER a set of principles that constitute the proposed conclusion of this review. These principles are designed to assist colleges that may wish to use scholarships, among other reasons, for the purpose of increasing the diversity of intellectual experiences available within a student population without running afoul of the anti-discrimination provisions of Title VI.

After a 90 day period for comment, the Department will publish its set of final principles and then use these in reviewing all complaints of discrimination concerning race-

exclusive college financial aid. The Department will also offer technical advice to those colleges that may wish to adjust their financial aid programs based upon these principles.

The Department does not want any student now attending college on a race-exclusive scholarship to lose that scholarship as a result of the formulation of these principles. Therefore, where these principles require the adjustment of any college financial aid program, there will be a four-year transition period during which the Department will work with colleges to bring them into compliance without harming any student under scholarship.

Principles:

1. RACE-NEUTRAL AID FOR DISADVANTAGED STUDENTS -- Colleges may make awards to disadvantaged students without regard to race, even if that means that such awards go disproportionately to minority students. (Note: For purposes of these principles "college" means any postsecondary institution, and "scholarship" means any financial aid, including loans and graduate fellowship programs.)

A "disadvantaged" student is one who, despite facing significant obstacles, has prepared himself or herself for a college education. These may be students from low income

families. For example, almost one of two full-time undergraduate students has a federal grant or loan, virtually all of which are based upon financial need. These may be students from school districts with high drop-out rates, or students from single-parent families or from families in which few or no members have attended college. None of these or other race-neutral ways of identifying and providing aid to disadvantaged students would present Title VI discrimination problems.

2. SCHOLARSHIPS TO CREATE DIVERSITY -- A college may consider race as one factor among several when awarding scholarships designed to help create the kind of campus educational environment that results from having a student population with a variety of experiences, opinions, backgrounds, and cultures.

America is unique because it has forged one nation from many people of a remarkable number of different backgrounds. Many colleges seek to create on campus an intellectual environment that reflects that diversity. A college should have substantial discretion to weigh many factors -- including race -- in its efforts to attract and retain a student population of many different experiences, opinions, backgrounds, and cultures -- provided that race is not, in effect, a condition of eligibility for the scholarship.

The Department's Title VI regulations permit a college to seek such diversity. The Title VI regulations permit a recipient to take this type of voluntary affirmative action to overcome the effects of conditions that have resulted in limited participation by persons of a particular race or national origin. 34 C.F.R. 100.3(b)(6)(ii). The Department reviewed these regulatory provisions following the Supreme Court's decision in Regents of the University of California v. Bakke, 438 U.S. 765 (1978), and determined that no changes in the regulations were required.

3. RACE-EXCLUSIVE AID TO REMEDY DISCRIMINATION -- A college may award race-exclusive scholarships when that is necessary to overcome past discrimination.

The implementing regulations for Title VI require a recipient of Federal financial assistance that has been found in violation of the regulations not only to end its discriminatory practices, but also to take affirmative action to overcome the effects of past discrimination. 34 C.F.R. 100.3(b)(6)(i). A finding of past discrimination may be made by a court or by an administrative agency -- such as the Department's Office for Civil Rights. It may be made by a state or local legislative body, as long as the legislature has a strong basis in evidence identifying discrimination within its jurisdiction for which such remedial action is required.

4. FEDERAL RACE-EXCLUSIVE SCHOLARSHIPS -- Congress wrote Title VI, and Congress (within the limits of the U.S. Constitution) may create exceptions to Title VI.

Therefore, to the extent federal race-exclusive scholarships -- for example, the Patricia Roberts Harris Fellowship program, which helps minorities pursue graduate and professional studies - - seem to conflict with Title VI, the Department will consider Congress' specific legislative action to create an exception to the more general provisions of Title VI.

5. PRIVATELY FUNDED RACE-EXCLUSIVE SCHOLARSHIPS THAT DO NOT LIMIT AID OPPORTUNITIES FOR OTHER STUDENTS -- A college may administer private donor race-exclusive scholarships (a scholarship where the private donor restricts eligibility to students of designated races or national origins) where that aid does not limit the amount, type or terms of financial aid available to any student.

Thus, where a college determines to offer a financial aid package to a student that is permissible on a need basis, or under a program to create diversity, the school may use the private race-exclusive scholarship to fund that package. Accordingly, so long as the college's award of such financial aid is permissible under the principles outlined in categories one

through four above, the college may use race-exclusive scholarships funded by private donors to fund that award.

* * *

The Department has outlined these permissible circumstances to create more certainty in an area where competing responsibilities have created some uncertainty.

Aside from the circumstances contained in these principles, for a college receiving Federal funds to establish scholarships for which students of only a designated race or national origin may compete would appear to violate Federal anti-discrimination laws. Congress prohibited such financial aid by the terms of Title VI of the Civil Rights Act of 1964: "No person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

SOLICITATION OF COMMENTS: Interested persons are invited to submit written comments, views, and recommendations regarding the proposed policy guidance. All comments will be available for public inspection during and after the comment period in Room 5000, 330 C Street, S.W., Washington, D.C., between the

hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week, except Federal holidays.

PROGRAM AUTHORITY: 42 U.S.C. 2000d.

Dated: December 4, 1991

Lamar Alexander

Lamar Alexander
Secretary

Questions and Answers on the
Department of Education's Proposed
Guidance on Scholarships Awarded,
At Least in Part, on the Basis
of Race or National Origin

I. General Questions

Question: What is the purpose of the Department's proposed guidance?

Answer: The purpose is: to help colleges and universities find ways to structure their financial aid programs so that they can effectively attract a diverse and educationally stimulating student body and increase access to higher education, without unlawfully discriminating based on race, color or national origin.

Question: What statute is involved?

Answer: Title VI of the Civil Rights Act of 1964, which provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The Civil Rights Restoration Act of 1987 amended Title VI to provide that all of the operations of a college, university, or other postsecondary institution that receives Federal funds are covered by Title VI. The Department of Education is responsible for administering Title VI with regard to institutions receiving Federal education funds.

Question: What did the surveys reviewed by the Department show?

Answer: They revealed a variety of facts, including the following:

- There are relatively few race-exclusive scholarships (i.e. scholarships for which students of only a designated race or national origin may compete). For example, the ACE survey shows that race-exclusive scholarships offer awards to a relatively small percentage of minority students (less than 4%). However, many four-year colleges and universities have some of these scholarships.
- Institutional aid is the primary source of race-exclusive scholarships.

- Most race-exclusive scholarships consider need (and often other factors) in addition to race.
- Overall, most scholarship aid is awarded on the basis of need, and a much higher proportion of minority students are eligible for need-based aid than are non-minority students.

4. Question: What will the Department do regarding a college or university with a race-exclusive scholarship program that the Department considers to be in violation of Title VI?

Answer: The Department will provide technical assistance to such colleges and universities to adjust their programs within four years. These institutions can achieve their valid objectives without running afoul of Title VI and we will help them do so. The Department pledges to work with schools to ensure that no one currently under scholarship loses aid as a result of this guidance.

II. Types of Scholarship Programs Tailored To Benefit Minorities That Are and Are Not Permitted Under Title VI

5. Question: If race-exclusive scholarships are ordered by a court or administrative body as a remedy for discrimination, or are agreed to in settlement of a discrimination case, are they lawful under Title VI?

Answer: Yes. Such remedies can be found in litigated judgments, consent decrees or compliance plans required by the Department's Office for Civil Rights.

6. Question: Can a college or university award a race-exclusive scholarship authorized by a state or local legislative body to remedy discrimination?

Answer: Yes, provided the state or local legislative body has a strong basis in evidence identifying discrimination at colleges or universities within its jurisdiction for which such remedial action is appropriate.

7. Question: Can a college or university concentrate financial aid on economically disadvantaged students (low family income), educationally disadvantaged students (poor school system), or socially disadvantaged students (few if any family members had ever attended college)?

Answer: Yes, and the available evidence suggests that such race-neutral aid programs would disproportionately benefit minority students.

8. Question: Does the Department of Education administer any scholarship programs for minority students?

Answer: The Department administers several programs created by the Congress that give a preference to minority students, as do a number of other Federal agencies. These programs include the Patricia Roberts Harris Fellowships Program, which assists graduate and professional students from traditionally underrepresented groups, such as minorities and women, who plan to pursue a career in public service; and the Indian Education Fellowships Program, which provides financial aid to Indian students for undergraduate and graduate education in specified fields of study. Because these programs were enacted by Congress, they are not covered by Title VI.

9. Question: Will colleges be permitted to continue to administer the National Science Foundation's Research Careers for Minority Scholars Program, which pays tuition for minority graduate and undergraduate students in the science and engineering fields?

Answer: Yes. The National Science Foundation's Programs, like several programs administered by the Department of Education, were created by Congress and are therefore not covered by Title VI.

10. Question: Can a recipient college or university award or administer a scholarship for which race or national origin is a positive factor because the school is seeking a student body of individuals with diverse backgrounds?

Answer: Yes. An understanding of how and why this is so requires a brief lesson in legal history. The Supreme Court decided in Regents of the University of

California v. Bakke, 438 U.S. 265 (1978) that Title VI precludes a recipient university from setting aside specific slots in a medical school class for minority candidates. On the other hand, the Court allowed an admissions plan in which race or national origin is deemed a "plus" in the applicant's file and considered along with other factors. Such an admissions plan is permitted because a university has a compelling educational interest in assembling a student body with a variety of opinions, backgrounds, cultures, and experiences. The objective of considering race or national origin as a plus factor in an applicant's favor must be the cultivation of a robust educational environment, not racial or ethnic balance for its own sake. All students must be evaluated as individuals.

The Department believes financial aid decisions can involve similar considerations. A university's consideration of race or national origin as a positive factor in financial aid is justified where it is designed to attract and retain an educationally stimulating and diverse student body.

11. **Question:** Will the Department allow a recipient of federal education funds to accept and administer a privately funded scholarship that is designated by the donor for students of a particular race or national origin?

Answer: Yes, where that aid does not limit the aid opportunities of other students. For example, if a financial aid package to a student is permissible on a need basis, or under a program to create diversity, the university can rely on the privately funded race-exclusive scholarship to fund that package.

12. **Question:** Under the proposed policy, will colleges be able to accept and administer privately funded race-exclusive scholarships like the ones proposed by the Fiesta Bowl last year?

Answer: In general, yes, for the reasons stated in the immediately preceding answer.

13. Question: Can a non-profit foundation formed to support a university's financial aid program fund and administer race-exclusive scholarships?

Answer: There is no Title VI issue if a race-exclusive scholarship is funded and administered by a non-recipient of federal funds. To fall within this principle, however, the foundation must not constitute part of the "operations" of the university within the meaning of the Civil Rights Restoration Act.

14. Question: How can colleges attract minority students in order to have a diverse student body if race-exclusive scholarships are not an available tool?

Answer: Some race-exclusive scholarships are permissible. Some are not. If diversity is the goal, colleges may consider race or national origin as a positive factor, among other factors, in awarding scholarships as a means of attracting and retaining a diverse student body. Just as colleges have been able to promote diversity through admissions policies that use race or national origin as one consideration in evaluating applications for admission to the institution, so too can colleges adopt student aid policies that further their goals of an educationally stimulating and diverse student body by using race or national origin as one consideration in evaluating applications for financial assistance.

15. Question: Under the proposed policy, how can a college continue to address the need for scholarships to assist disadvantaged minority students?

Answer: Colleges can meet the financial needs of economically disadvantaged minority students by awarding financial aid to students on the basis of their economic disadvantage. Title VI does not prohibit race-neutral criteria, such as economic disadvantage, that may disproportionately benefit minority students.